: 4410-09-P

DEPARTMENT OF JUSTICE
Drug Enforcement Administration

Michael Jones, M.D.
Decision and Order

On September 19, 2019, the Drug Enforcement Administration (hereinafter, DEA or Government) Administrative Law Judge Charles Wm. Dorman (hereinafter, ALJ), issued an Order Granting Government's Motion for Summary Disposition and Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision (hereinafter, RD) on the action to revoke the DEA Certificate of Registration Number BJ5665281 of Michael Jones, M.D. The ALJ transmitted the record to me on October 15, 2019, and asserted that no exceptions were filed by either party. ALJ Transmittal Letter, at 1. Having reviewed and considered the entire administrative record before me, I adopt the ALJ's RD with minor modifications, where noted herein.*

ORDER

Pursuant to 28 C.F.R. § 0.100(b) and the authority vested in me by 21 U.S.C. § 824(a), I hereby revoke DEA Certificate of Registration No. BJ5665281 issued to Michael Jones, M.D. Further, pursuant to 28 C.F.R. § 0.100(b) and the authority vested in me by 21 U.S.C. § 823(f), I hereby deny any pending application of Michael Jones to renew or modify this registration, as well as any other pending application of Michael Jones, for additional registration in Louisiana. This Order is effective [insert Date Thirty Days From the Date of Publication in the Federal Register].

D. Christopher Evans,
Acting Administrator.

*A I have made minor, nonsubstantive, grammatical changes to the RD. Where I have made more substantive changes, I have marked the changes with an asterisk, brackets and explanatory footnotes.

Paul E. Soeffing, Esq., for the Government

Robert C. Jenkins, Esq., for the Respondent

ORDER GRANTING GOVERNMENT'S MOTION FOR SUMMARY DISPOSITION AND RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION OF THE ADMINISTRATIVE LAW JUDGE

The Assistant Administrator, Diversion Control Division, Drug Enforcement Administration ("DEA"), issued an Order to Show Cause ("OSC"), dated June 19, 2019, proposing to revoke the Certificate of Registration ("COR"), Number BJ5665281, of Michael Jones, M.D. ("Dr. Jones" or "Respondent"), and to deny any applications for renewal or modification of such registration, and any applications for any other DEA registrations, pursuant to 21 U.S.C. § 824(a)(5). The OSC alleges that revocation is warranted because Respondent has been mandatorily excluded from all federal health care programs under 42 U.S.C. § 1320a-7(a).

The Office of Administrative Law Judges ("OALJ") received a copy of the OSC on June 19, 2019. OSC, at 1. Dr. Jones, through counsel, filed a hearing request on July 19, 2019, the 30th day from the date of the OSC. Thus, Dr. Jones's hearing request was timely filed.

On July 19, 2019, I issued an Order for Prehearing Statements ("OPHS"), directing the parties to file prehearing statements and establishing a date for a telephonic prehearing conference. OPHS, at 1-2. The Government timely filed its prehearing statement on August 2, 2019. Dr. Jones did not file a prehearing statement by his deadline for doing so.

I conducted a telephonic prehearing conference with the parties on August 21, 2019. Following the conference, I issued a Prehearing Ruling ("PHR"), in which I directed Dr. Jones to file a prehearing statement and a motion for leave to file his prehearing statement out of time.

On August 26, 2019, Dr. Jones filed his prehearing statement along with a motion for leave to file his prehearing statement out of time. Because the Government did not file an opposition to Respondent's motion for out-of-time filing, on September 10, 2019, I issued an Order Granting Respondent's Motion for Out of Time Prehearing Statement and Notice Concerning Summary Disposition ("Order Concerning Summary Disposition"), which granted

Respondent's motion for out-of-time filing as unopposed. My Order Concerning Summary Disposition also established a deadline for the Government to file a motion for summary disposition and for Dr. Jones to respond to the Government's motion for summary disposition.

The Government timely filed its Motion for Summary Disposition on September 13, 2019. Dr. Jones timely filed his Opposition to Government's Motion for Summary Disposition on September 18, 2019 ("Respondent's Opposition"). Accordingly, I base this ruling and Recommended Decision on the Government's Motion for Summary Disposition, Dr. Jones's Opposition, and the Administrative Record before me.

The issue in this case is whether the record as a whole establishes by a preponderance of the evidence that the DEA should revoke the Certificate of Registration of Michael Jones, M.D., No. BJ5665281/XJ5665281, and deny any applications for renewal or modification of such registration, and deny any applications for any other DEA registrations, pursuant to 21 U.S.C. § 824(a)(5), because he has been excluded from federal health care programs under 42 U.S.C. § 1320a-7(a).

THE FACTS

I. Stipulations

During the telephonic prehearing conference, the parties agreed to the following stipulations ("Stip."), which are accepted as facts in this proceeding:

1. Respondent is registered with the DEA as a practitioner-DW/30 in Schedules II through V under DEA Certificate of Registration BJ5665281/XJ5665281 with a registered address of 3405 Saint Claude Ave., New Orleans, LA 70117-6144, and a mailing address of 2433 Bedford Dr., New Orleans, LA 70131-4703. Respondent's registration expires by its terms on December 31, 2021.
2. On or about September 25, 2018, Judgment was entered against Respondent based on Respondent's conviction on one count of "Conspiracy to Commit Health Care Fraud," in violation of 18 U.S.C. § 1349, one count of "Conspiracy to Pay and Receive Illegal

Health Care Kickbacks," in violation of 18 U.S.C. § 371, and seven counts of "Health Care Fraud," in violation of 18 U.S.C. §§ 1347 and 2. *U.S. v. Michael Jones*, No. 2:15-cr-00061-SM-JCW (E.D. La. filed Sept. 28, 2018).

3. Based on Respondent's conviction, the U.S. Department of Health and Human Services, Office of Inspector General ("HHS/OIG"), by letter dated March 29, 2019, mandatorily excluded Respondent from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of ten years pursuant to 42 U.S.C. § 1320a-7(a), effective April 18, 2019.

4. Reinstatement of eligibility to participate in Medicare, Medicaid and all federal health care programs after exclusion by HHS/OIG is not automatic.

5. Respondent is currently excluded from participation in Medicare, Medicaid and all federal health care programs.

6. Respondent stipulates to the admissibility of Government Exhibits 1-4.

I. Government's Position

In its Motion for Summary Disposition, the Government argues that there is no dispute of material fact requiring an adversarial hearing. Gov't Summ. Disp., at 1, 5-6. Specifically, the Government notes that Dr. Jones does not dispute that he is currently excluded from federal health care programs under 42 U.S.C. § 1320a-7(a). *Id.* at 5. After quoting the entirety of Dr. Jones's proposed testimony from his Prehearing Statement and noting his single proposed exhibit, the Government argues that based on his Prehearing Statement, Dr. Jones "does not intend to provide any testimony or documentary evidence as to why his registration should not be revoked." *Id.* at 4-5. Continuing, the Government argues that Dr. Jones's Prehearing Statement "makes no proffer as to why, in the face of his exclusion, he should be allowed to retain his registration." *Id.* Consequently, the Government argues that granting summary disposition in the Government's favor is consistent with DEA precedent because Dr. Jones has failed "to identify any issue of material fact in his Prehearing Statement that would warrant the

holding of a hearing or the presentation of testimony." *Id.* at 1. In conclusion, the Government requests that Dr. Jones's COR be revoked. *Id.* at 6.

II. Respondent's Position

In his Opposition, Dr. Jones argues that summary disposition is inappropriate because he appealed his conviction to the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit"). Resp't Opposition, at 1. Although the Fifth Circuit has not yet ruled on Dr. Jones's appeal, his Opposition states that he believes his appeal has merit on the ground that the prosecution "failed to present sufficient evidence at trial to sustain his convictions." *Id.* The Opposition further states that Dr. Jones's counsel intends to "outline the relevant issues in that appeal at his [DEA] hearing." *Id.* Respondent's Opposition reiterates the substance of the testimony that is contained in his Prehearing Statement concerning his appeal pending before the Fifth Circuit, but adds for the first time that the DEA proceeding should be "deferred until after the Fifth Circuit resolves the appeal." *Id.*

ANALYSIS

Under DEA precedent, "it is well-settled that when no question of material fact is involved, a plenary, adversary administrative proceeding involving evidence and cross-examination of witnesses is not obligatory." *Michael G. Dolin, M.D.*, 65 Fed. Reg. 5661, 5662 (2000). This precedent is based on the principle that "Congress did not intend administrative agencies to perform meaningless tasks." *Sandra J.S. Tyner, M.D.*, 63 Fed. Reg. 56,223, 56,223 (1998). "'[C]ommon sense suggests the futility of hearings where there is no factual dispute of substance.'" *Richard Jay Blackburn, D.O.*, 82 Fed. Reg. 18,669, 18,672 (2017) (quoting *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987)). The central inquiry when deciding a motion for summary disposition is whether there is "a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

The "party moving for summary disposition 'must show, with materials of appropriate evidentiary quality, that every state of facts is excluded save that which entitles [it] to relief.'"

Bio Diagnostic Int'l, 78 Fed. Reg. 39,327, 39,328-29 (2013). The underlying facts are "'viewed in the light most favorable to the'" non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). Once the moving party satisfies its burden to show that there is no genuine dispute of material fact, the non-movant is tasked with presenting "'competent evidence that could be presented at trial showing that there is a genuine dispute as to a material fact.'" *William J. O'Brien, III, D.O.*, 82 Fed. Reg. 46,527, 46,529 (2017) (quoting 10B Charles Allen Wright, *et al.*, *Federal Practice and Procedure Civ*. § 2727.2 (4th ed. April 2017)).

"A fact is '*material*' if it '*might affect* the outcome of the suit under the governing law.'" *Bazan v. Hidalgo Cty.*, 246 F.3d 481, 489 (5th Cir. 2001) (emphasis in original) (quoting *Liberty Lobby, Inc.*, 477 U.S. at 248). To be considered material, a fact must be "outcome determinative." *Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1264 (5th Cir. 1991). In other words, a material fact is a fact that has the potential to affect the outcome of the case. Failure to present material evidence that could impact the outcome of the case is fatal to the non-moving party. *William J. O'Brien, III, D.O.*, 82 Fed. Reg. at 46,529. An issue is genuine if the evidence resolving the issue is sufficient to support a ruling in favor of the party opposing summary judgment. *Prof'l Managers, Inc. v. Fawer, Brian, Hardy & Zatzkis*, 799 F.2d 218, 222 (5th Cir. 1986). An issue must be "real and substantial" to be considered genuine. *Bazan*, 246 F.3d at 489.

The Administrative Record contains "reliable and probative evidence" to support the conclusion that there is no genuine issue of material fact requiring an adversarial hearing. *Richard Jay Blackburn, D.O.*, 82 Fed. Reg. at 18,672-73. To begin, at the prehearing conference, the Government and Respondent entered into all the relevant factual stipulations necessary to establish a *prima facie* case for sanction under 21 U.S.C. § 824(a)(5). Specifically, the Parties stipulated that Dr. Jones was convicted of federal offenses involving health care fraud in the United States District Court for the Eastern District of Louisiana ("District Court") (Stip.

2); that as a result of his convictions the HHS/OIG mandatorily excluded Dr. Jones from participating in Medicare, Medicaid, and all federal health care programs for ten years beginning on April 18, 2019 (Stip. 3); that reinstatement in federal health care programs is not automatic (Stip. 4); and that Dr. Jones is currently excluded from participating in federal health care programs (Stip. 5). PHR, at 1-2. Lastly, Respondent stipulated to the admissibility of the Government's exhibits (Stip. 6). *Id*. at 2.

The Government attached evidence to its Motion for Summary Disposition corroborating the factual stipulations. Specifically, the Government attached a notarized Certification of Registration History (Exh. 1); a copy of the judgment entered by the District Court against Dr. Jones (Exh. 2); a copy of the HHS/OIG exclusion letter (Exh. 3); and a printout from the HHS/OIG website (Exh. 4).

The notarized Certification of Registration History, dated June 24, 2019, is signed by the Associate Chief of DEA's Registration and Program Support Section. Gov't Summ. Disp., Exh. 1, at 1. The Certification states that Dr. Jones is registered with the DEA as a practitioner-DW/30 to handle controlled substances in Schedules 2-5 under COR No. BJ5665281 and that DEA last approved the renewal of this registration on November 29, 2018. *Id*. The Certification further states that this registration expires on December 31, 2021, and that it is currently under active pending status. *Id*. The Certification additionally states that this registration number is the only DEA registration associated with Dr. Jones. *Id*.

The Government's next exhibit is the judgment entered by the District Court against Dr. Jones on September 25, 2018. The District Court's judgment form shows that Dr. Jones was found guilty of one count of conspiracy to commit health care fraud (18 U.S.C. § 1349); one count of conspiracy to pay and receive illegal health care kickbacks (18 U.S.C. § 371); and seven counts of health care fraud (18 U.S.C. § 1347). Gov't Summ. Disp., Exh. 2, at 1. The judgment further ordered Dr. Jones to pay $347,525 in restitution to Medicare, and sentenced him to serve three years in prison followed by two years of supervised release. *Id*. at 2-3, 6.

Next, the Government attached a copy of the HHS/OIG exclusion letter, dated March 29, 2019. That letter shows that as a result of Dr. Jones's convictions, HHS excluded him from participating in Medicare, Medicaid, and all federal health care programs for ten years. Gov't Summ. Disp., Exh. 3, at 1. The letter explains that Dr. Jones's ten-year exclusion would become effective twenty days from the date of the letter. *Id*. The letter further explains that Dr. Jones's exclusion is based on his conviction of a program-related crime. *Id*.; 42 U.S.C. § 1320a-7(a)(1). In addition, the letter explains that reinstatement in federal health care programs is not automatic. *Id*. at 3. Lastly, the Government attached a printout from the HHS/OIG website, which shows that Dr. Jones has been excluded from federal health care programs since April 18, 2019, for a program-related conviction. Gov't Summ. Disp., Exh. 4, at 1.

The four exhibits attached to the Government's Motion are the same exhibits the Government identified in its prehearing statement. *See* Gov't PHS, at 3 (describing each of the Government's four exhibits intended for use at the hearing). Respondent stipulated to the information that is contained in each of those exhibits (Stips. 2-5) as well as the admissibility of those exhibits if they were offered at trial (Stip. 6). Based on the Government's exhibits and the Parties' factual stipulations to the contents of those exhibits, as well as their admissibility, I find that the Administrative Record contains "reliable and probative evidence" that Dr. Jones is currently excluded from Medicare, Medicaid, and all federal health care programs pursuant to a program-related conviction. *Richard Jay Blackburn, D.O.*, 82 Fed. Reg. at 18,672-73. The Administrative Record further establishes that Dr. Jones's ten-year exclusion from all federal health care programs is the result of his convictions related to health care fraud. The Administrative Record also shows that Dr. Jones's exclusion began on April 18, 2019. And based on the Parties' factual stipulations, Respondent does not dispute that he was convicted of fraud-related crimes and then excluded by HHS/OIG from all federal health care programs.

To meet its burden for sanction under 21 U.S.C. § 824(a)(5), the Government must show that Respondent is excluded from participating in Medicare, Medicaid, and all federal health care programs under one of the four bases for mandatory exclusion in 42 U.S.C. § 1320a-7(a). Mandatory exclusion from a federal health care program under 42 U.S.C. § 1320a-7(a) serves as an independent basis for revoking a DEA registration. 21 U.S.C. § 824(a)(5); *Terese, Inc., d/b/a Peach Orchard Drugs*, 76 Fed. Reg. 46,843, 46,847 (2011); *Dinorah Drug Store, Inc.*, 61 Fed. Reg. 15,972, 15,973 (1996).

Once the Government meets its burden, the issue becomes which sanction should DEA impose in light of considerations concerning acceptance of responsibility, mitigation, egregiousness, and deterrence. *Jeffrey Stein, M.D.*, 84 Fed. Reg. 46,968, 46,972 (2019). To resolve this issue, the DEA considers whether the respondent "has presented 'sufficient mitigating evidence to assure the Administrator that [he] can be trusted with the responsibility carried by'" a DEA registration. *Id*. (alteration in original) (quoting *Samuel S. Jackson, D.D.S.*, 72 Fed. Reg. 23,848, 23,853 (2007)); *see also Kwan Bo Jin, M.D.*, 77 Fed. Reg. 35,021, 35,023-25 (2012) (concluding the Government "met its burden of proving its Section 824(a)(5) claim" and then considering the five public interest factors to determine whether respondent met his burden "to show that . . . granting him a COR would not be contrary to the public interest."). The material issues in this case are, therefore, quite simple: is Dr. Jones excluded under 42 U.S.C. § 1320a-7(a), and, if so, does the evidentiary record support the Government's requested sanction?

As discussed above, there is no dispute that Dr. Jones is currently excluded from all federal health care programs under 42 U.S.C. § 1320a-7(a)(1). There is no dispute because Dr. Jones does not contest the fact that HHS/OIG excluded him from eligibility to participate in all federal health care programs for ten years beginning on April 18, 2019. Stips. 3, 5. Thus, to defeat the Government's Motion, Dr. Jones must present "'competent evidence that could be presented at trial'" relevant to the issue of which sanction should DEA impose. *William*

J. O'Brien, III, D.O., 82 Fed. Reg. at 46,529 (quoting 10B Charles Allen Wright, *et al.*, *Federal Practice and Procedure Civ*. § 2727.2 (4th ed. April 2017)). In other words, to raise an issue of material fact, Dr. Jones would need to present evidence relevant to acceptance of responsibility, mitigation, egregiousness, or deterrence. *Jeffrey Stein, M.D.*, 84 Fed. Reg. at 46,972. He has failed to do so.

Instead, Dr. Jones responded to the Government's Motion with the same proposed evidence he raised in his Prehearing Statement. And despite the fact that Dr. Jones was allowed to file a prehearing statement after the original deadline for doing so, and despite my advice to him at the prehearing conference concerning the level of detail that his prehearing statement should contain, Dr. Jones filed a prehearing statement with only a single sentence of proposed testimony. That single sentence previewed that Dr. Jones would testify that he appealed his criminal sentence to the Fifth Circuit and he believes his conviction will be overturned.[1] Resp't PHS, at 3. Dr. Jones's Prehearing Statement noticed only one exhibit: a copy of the certified notice of his appeal to the Fifth Circuit. *Id*. In his Opposition to the Government's Motion, Dr. Jones states that he appealed his conviction to the Fifth Circuit and that he believes his appeal has merit.[2] Resp't Opposition, at 1. Dr. Jones's Opposition further previews that his counsel intends to "outline" at the DEA hearing the issues he has appealed to the Fifth Circuit.[3] *Id*.

Dr. Jones's appeal of his conviction has no bearing on the issues relevant to this case. First, the appeal of his conviction does not change the fact that beginning on April 18, 2019, HHS/OIG excluded him from federal health care programs for ten years. Furthermore, Dr. Jones's pending appeal does not change the fact that he is currently excluded from all federal health care programs for a program-related conviction under 42 U.S.C. § 1320a-7(a)(1).

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[1] Notwithstanding the irrelevance of this proposed testimony, it is unclear how an appeal of his sentence would affect the underlying conviction.
[2] Again, notwithstanding the irrelevance of this statement, the basis for this belief is unclear.
[3] Again, notwithstanding the irrelevance of his appeal, it is unclear how Respondent's counsel intends to "outline" the issues of that appeal at the hearing since he failed to disclose in his prehearing statement, or his Opposition, what issues he intends to "outline."

Because it is Dr. Jones's mandatory exclusion and not his underlying conviction that forms the basis for sanction in this case, his appeal of the conviction is not a relevant consideration. Second, the appeal does not bear in any way on the issue of whether Dr. Jones can be trusted with handling controlled substances during his ten-year exclusion. In other words, the existence of a pending appeal is not mitigating evidence that is probative of Dr. Jones's ability to responsibly discharge the duties of a DEA registrant and to comply with controlled substance laws. Third, whether Dr. Jones's appeal will be successful and, if so, whether HHS/OIG will reinstate his eligibility to participate in federal health care programs, is pure speculation. Even if his appeal is successful, and his convictions are erased, it is speculative at this time to predict whether and when HHS/OIG will reinstate Dr. Jones's eligibility to participate in federal health care programs. And "unsupported speculation [is] not sufficient to defeat a motion for summary judgment." *Brown v. City of Houston*, 337 F.3d 539, 541 (5th Cir. 2003).

Rather than respond to the Government's Motion with probative evidence that bears on the issue of whether he can be trusted to handle controlled substances, Dr. Jones has collaterally attacked the criminal proceedings underlying his mandatory exclusion. A respondent cannot use DEA proceedings to collaterally attack proceedings litigated in another forum. *Kristen Lee Raines, A.P.R.N.*, 81 Fed. Reg. 14,890, 14,891-92 (2016); *see also Hicham K. Riba, D.D.S.*, 73 Fed. Reg. 75,773, 75,774 (2008) (same); *Brenton D. Glisson, M.D.*, 72 Fed. Reg. 54,296, 54,297 (2007) (same). There is a proper forum for Dr. Jones to litigate his criminal convictions, and the DEA is not that forum. In addition, there is a proper forum to litigate his mandatory exclusion, and the procedures for doing so are provided on page 4 of the HHS/OIG exclusion letter in a section titled, "How to Appeal Your Exclusion." Gov't Summ. Disp., Exh. 3, at 4. Dr. Jones may disagree with his conviction and exclusion, but a DEA proceeding is not the proper place to voice that disagreement.

In sum, the Administrative Record contains substantial, undisputed evidence to establish a *prima facie* case for sanction under 21 U.S.C. § 824(a)(5). Specifically, the evidence proves

that Dr. Jones is currently excluded from Medicare, Medicaid, and all federal health care programs under 42 U.S.C. § 1320a-7(a)(1) pursuant to a program-related conviction involving fraudulent activity. Dr. Jones's exclusion from federal health care programs under 42 U.S.C. § 1320a-7(a)(1) is an independent basis for sanction under 21 U.S.C. § 824(a)(5). Furthermore, the evidence that Dr. Jones has presented in response to the Government's Motion fails to raise a genuine issue of material fact necessitating an adversarial hearing. The only evidence Dr. Jones has presented concerns a pending appeal and pure speculation about the appeal's chance of success. The evidence of Dr. Jones's appeal bears no relevance to the issue of whether Dr. Jones can be trusted with a DEA Certificate of Registration in light of the fact that the Government has satisfied its burden for sanction under 21 U.S.C. § 824(a)(5). Because Dr. Jones's pending appeal cannot affect "'the outcome of [this case] under the governing law,'" it is not a material fact, and therefore, it is insufficient to defeat the Government's Motion. *Bazan*, 246 F.3d at 489 (quoting *Liberty Lobby, Inc.*, 477 U.S. at 248).

Accordingly, the Government's Motion for Summary Disposition is **GRANTED,** and the scheduled hearing in this matter is, therefore, **CANCELLED.**

With respect to Dr. Jones's request in his Opposition to stay these proceedings until the resolution of his appeal, that request is **DENIED.** Dr. Jones cites no case law to support the proposition that he is entitled to a stay of these proceedings pending his appeal. Furthermore, staying this case pending Dr. Jones's appeal would significantly diverge from well-established DEA precedent. [*See Grider Drug #1 & Grider Drug #2*, 77 Fed. Reg. 44070, 44104 n.97 (2012); *see also Newcare Home Health Servs.*, 72 Fed. Reg. 42,126, 42,127 (2007).][*B] Dr. Jones has not pointed to any legal authority, and provided no legal argument, to justify diverging from DEA's consistent precedent against granting stays pending the outcome of other proceedings, *[and as noted herein, the outcome of his appeal does not directly affect this proceeding.]

SANCTION

[*B] Omitted parts of citation for clarity.

Once the Government makes a *prima facie* case for sanction, the burden shifts to the respondent to demonstrate that despite the proven allegations, maintaining his DEA registration would not be inconsistent with the public interest. *Kwan Bo Jin, M.D.*, 77 Fed. Reg. at 35,023. This would require the respondent to credibly accept responsibility for his misconduct or point to evidence mitigating the gravity of his offense. *Id*. at 35,026. Here, because the Administrative Record establishes a *prima facie* case for sanction, the next question is "whether revocation . . . is the appropriate sanction in light of the facts" and Respondent's evidence. *Samuel Arnold, D.D.S.*, 63 Fed. Reg. at 8688.

Revoking a registration on the ground that the registrant has been mandatorily excluded from federal health care programs is discretionary. *Dinorah Drug Store, Inc.*, 61 Fed. Reg. at 15,973. Since revocation is a matter of discretion, the DEA has advised that the public interest factors outlined in 21 U.S.C. § 823(f) may be consulted in determining the appropriate sanction, although the ALJ is not obligated to analyze them. *Id.*; *see, e.g.*, *Johnnie Melvin Turner, M.D.*, 67 Fed. Reg. at 71,203-04 (revoking registration based on mandatory exclusion without conducting public interest inquiry). It is not required that the underlying misconduct involved controlled substances, but that can be a relevant consideration.[4] *Dinorah Drug Store, Inc.*, 61 Fed. Reg. at 15,974.

[*C]The Administrator has explained that because DEA employs roughly 1,625 individuals to regulate over 1.8 million registrants, the Administration relies heavily on a registrant's honesty and integrity "to complete its mission of preventing diversion within such a large

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[4] DEA has reiterated its well-established precedent in numerous final orders that the underlying conviction that led to mandatory exclusion does not need to involve controlled substances to support sanction. *See, e.g.*, *Jeffrey Stein, M.D.*, 84 Fed. Reg. 46,968, 46,971 (2019); *Mohammed Asgar, M.D.*, 83 Fed. Reg. 29,569, 29,571 (2018); *Narciso A. Reyes, M.D.*, 83 Fed. Reg. 61,678, 61,681 (2018); *Richard Hauser, M.D.*, 83 Fed. Reg. 26,308, 26,310 (2018); *Orlando Ortega-Ortiz, M.D.*, 70 Fed. Reg. 15,122, 15,123 (2005); *Juan Pillot-Costas, M.D.*, 69 Fed. Reg. 62,084, 62,085 (2004); *Daniel Ortiz-Vargas, M.D.*, 69 Fed. Reg. 62,095, 62,095-96 (2004); *KK Pharmacy*, 64 Fed. Reg. 49,507, 49,510 (1999); *Melvin N. Seglin, M.D.*, 63 Fed. Reg. 70,431, 70,433 (1998); *Anibal P. Herrera, M.D.*, 61 Fed. Reg. 65,075, 65,078 (1996); *Stanley Dubin, D.D.S.*, 61 Fed. Reg. 60,727, 60,728 (1996); *Richard M. Koenig, M.D.*, 60 Fed. Reg. 65,069, 65,071 (1995); *George D. Osafo, M.D.*, 58 Fed. Reg. 37,508, 37,509 (1993); *Nelson Ramirez-Gonzalez, M.D.*, 58 Fed. Reg. 52,787, 52,788 (1993); *Gilbert L. Franklin, D.D.S.*, 57 Fed. Reg. 3441, 3441 (1992).

[*C] Omitted sentence for clarity.

regulated population." *Jeffrey Stein, M.D.*, 84 Fed. Reg. at 46,974. Because DEA depends on the integrity of those it entrusts with controlled substance privileges, it takes a close look at a registrant's fraudulent activity. *See Nelson Ramirez-Gonzalez, M.D.*, 58 Fed. Reg. 52,787, 52,788 (1993) (noting fraudulent activity "casts doubt upon [a registrant's] integrity"). Although a registrant's fraud may not involve controlled substances, fraudulent activity indicates that a registrant "place[s] monetary gain above the welfare of his patients, and in so doing, endanger[s] the public health and safety." *George D. Osafo, M.D.*, 58 Fed. Reg. 37,508, 37,509 (1993).

The Government's evidence does not provide details concerning Dr. Jones's criminal misconduct; however, the District Court's judgment offers sufficient information to find that Dr. Jones committed fraudulent activity related to medical services. Dr. Jones was convicted of seven counts of violating 18 U.S.C. § 1347 ("Health care fraud"). Gov't Summ. Disp., Exh. 2, at 1. The elements of this statute require proof that an individual knowingly or willfully executed a scheme "to defraud any health care benefit program," or "to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program." 18 U.S.C. § 1347(a). Dr. Jones was further convicted of one count of violating 18 U.S.C. § 371 ("Conspiracy to commit offense or to defraud United States"), which subjects persons who conspire "to commit any offense against the United States, or to defraud the United States," to a maximum prison sentence of five years, or to payment of a fine, or both. The District Court's judgment specifies that Dr. Jones's violation of 18 U.S.C. § 371 involved conspiracy to pay and receive illegal health care kickbacks. Gov't Summ. Disp., Exh. 2, at 1. The District Court sentenced Dr. Jones to three years' imprisonment, to be served, if practicable, after the term of imprisonment of his co-defendant. *Id*. at 2. The District Court further imposed two years of supervised release after Dr. Jones serves his prison term, and ordered him to pay $347,525 to Medicare in restitution. *Id*. at 3, 6.

Despite the lack of evidence that Dr. Jones's criminal misconduct involved controlled substances, the District Court's judgment shows that Dr. Jones defrauded Medicare of hundreds of thousands of dollars. This type of criminal misconduct raises serious concerns about Dr. Jones's integrity and honesty, especially in his dealings with government agencies, and justifies revocation even if his misconduct did not involve controlled substances. *Anibal P. Herrera, M.D.*, 61 Fed. Reg. at 65,078; *Nelson Ramirez-Gonzalez, M.D.*, 58 Fed. Reg. at 52,788; *George D. Osafo, M.D.*, 58 Fed. Reg. at 37,509; *see also Jeffrey Stein, M.D.*, 84 Fed. Reg. at 46,972.

In fact, DEA has previously revoked registrations for misconduct comparable to Respondent's. *See Dan E. Hale, D.O.*, 69 Fed. Reg. 69,402, 69,406 (2004) (denying application based on material falsification and mandatory exclusion which resulted from fraud convictions); *Johnnie Melvin Turner, M.D.*, 67 Fed. Reg. at 71,204 (revocation based on exclusion from Medicare program after federal fraud conviction); *Stanley Dubin, D.D.S.*, 61 Fed. Reg. 60,727, 60,727 (1996) (revocation for exclusion from federal health care programs after state fraud conviction).

Furthermore, the exclusion letter notes that HHS/OIG deemed Dr. Jones's criminal misconduct to be egregious enough to warrant an exclusion period in excess of the statutory minimum. Gov't Summ. Disp., Exh. 3, at 1-2. The exclusion letter explains that HHS/OIG excluded Dr. Jones for ten years instead of the statutory minimum of five years, because (1) Dr. Jones's fraudulent activity was intended to cause financial loss to a government agency of more than $50,000; (2) he committed the fraudulent activity over a period of six years; and (3) the District Court's sentence included imprisonment. *Id*. at 2.

The DEA "carefully consider[s] mitigating evidence provided by the respondent" when deciding the appropriate sanction in a Medicare exclusion case. *Jeffrey Stein, M.D.*, 84 Fed. Reg. at 46,970. Dr. Jones, however, has failed to provide any mitigating evidence for the DEA to consider. Dr. Jones's failure to present mitigating evidence is the reason why granting summary

disposition in the Government's favor is appropriate. It is also the reason why, in light of the egregiousness of his fraudulent activity, revocation is the appropriate sanction.

In the face of Dr. Jones's exclusion, he has not presented any evidence to convince DEA that it can trust him with the privilege and responsibility to handle controlled substances. Dr. Jones fraudulently obtained hundreds of thousands of dollars from a United States government agency over a period of six years. Based on several aggravating circumstances, HHS/OIG found Dr. Jones's criminal activity to be sufficiently egregious to justify imposing a longer exclusion period than statutorily required. Dr. Jones has not responded with any indication that he intends to accept responsibility at the DEA hearing or that he feels remorse for his misconduct. In fact, Dr. Jones pled not guilty to the criminal charges and his position on appeal is that the prosecution failed to present enough evidence at trial. Gov't Summ. Disp., Exh. 2, at 1; Resp't Opposition, at 1. Pleading not guilty and then attacking the conviction on appeal is inconsistent with a respondent who accepts responsibility and feels remorse for his misconduct. Furthermore, Dr. Jones has not presented any mitigation evidence, to include evidence that he has taken steps to assure DEA that he will not engage in fraudulent activity in the future. In the absence of mitigation evidence demonstrating that DEA can entrust Dr. Jones with a registration, revocation is appropriate.

RECOMMENDATION

For these reasons, it is **RECOMMENDED** that Dr. Jones's DEA Certificate of Registration, Number BJ5665281/XJ5665281, be **REVOKED,** and that any of Dr. Jones's applications for renewal or modification of such registration, and any application by Dr. Jones for any other DEA registration, be **DENIED.**[5]

Dated: September 19, 2019.

Charles Wm. Dorman,
U.S. Administrative Law Judge.

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[5] Pursuant to 21 C.F.R. § 1316.66, a party may file exceptions to this Recommended Decision "[w]ithin twenty days after the date upon which a party is served a copy of" this Recommended Decision. *[No exceptions were timely filed.]

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